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MEMORANDUM

May 17, 2010

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FROM: Alex Smith

RE: Proposals for Incentivizing Cleanups at Contaminated Sites

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I. Introduction

This memorandum is in response to the "homework assignment" given the MTCA/SMS Advisory Group at our April meeting, for ideas that will give parties incentives to clean sites up. From a lawyer's perspective, I came up with five that either in isolation, or in combination, could help encourage parties to get some cleanups done. Some apply only to sediment sites, some could also apply to all MTCA sites.

II. Potential Incentives

One of the biggest incentives for a PLP to conduct a cleanup is finality (i.e. resolving their liability), so the following are focused primarily on that:

A. Adopt a "Cleanup Unit" Approach:

EPA has used "operable units" as a means to accomplish cleanups in discrete areas of a larger site, and EPA has been willing to give parties finality for individual operable units.

Notably, the term "operable unit" does not appear in CERCLA, but is found only in EPA's regulations. EPA's regulations define an "operable unit" as -

> A discrete action that comprises an incremental step toward comprehensively addressing site problems. This discrete portion of a remedial response manages migration, or eliminates or mitigates a release, threat of a release, or pathway of exposure. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

40 C.F.R. § 307.14.

For a "cleanup unit" option to work – i.e. provide an incentive for a party to remediate a cleanup unit, Ecology and the Attorney General's Office would need to be willing to give PLPs a consent decree with covenants not to sue and contribution protection for the remediation of a cleanup unit (which EPA does for operable units).[1] The covenants would only cover the work done to remediate the cleanup unit, so there could still be potential liability for a larger "site." However, a PLP could weigh the risks of ever being named for cleanup or contribution for the larger site when they choose to get finality for the cleanup unit. It does not resolve liability for a site as a whole, but would provide incentive to get something done in the short term.

B. Delete the Definition of "Site" from MTCA's Rules:

Both CERCLA and MTCA make parties liable for addressing "releases" of "hazardous substances" at a "facility." The MTCA ***statute*** does not define the term "site" -- it only defines "facility" -- the same way CERCLA does -- as:

> "Facility" means (a) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, vessel, or aircraft, or (b) ***any site or area where a hazardous substance***, other than a consumer product in consumer use, ***has*** been deposited, stored, disposed of, or placed, or ***otherwise come to be located***.

RCW 70.105D.020(5). However, the MTCA regulations also define the term "site" – and define it to mean the same thing as "facility." WAC 173-340-200 ("'Site' means the same as 'facility'").

I looked at CERCLA and the NCP and found no definition of "site" in either one. And, in looking at EPA RD/RA consent decrees, they tend to define the "site" as the area that will be actively remediated (as opposed to wherever contamination has come to be located).

Because EPA does not define "site" to mean the same thing as a facility, it can enter into a settlement under which a party cleans up a site that is something less than a "facility" (i.e.

[1] As discussed in section II.B., MTCA appears to give Ecology and the AG's Office discretion to resolve a PLP's liability for less than a whole "facility."

something less than "any site or area where a hazardous substance . . . has . . . otherwise come to be located"). EPA's authority to do that is confirmed its (and the Department of Justice's) settlement authority under CERCLA, which allows them to:

> [E]into an agreement with any person . . . to perform any response action . . . . Whenever practicable and in the public interest . . . the President shall facilitate agreements under this section that are in the public interest and consistent with the National Contingency Plan in order to ***expedite effective remedial actions and minimize litigation***.

42 U.S.C. § 9622(a).

With MTCA's regulations defining "facility" and "site" to mean the same thing, the argument can be made that a PLP will not be considered to have cleaned up a "site" unless it also cleaned up the larger "facility." By removing the definition that requires "site" to mean the same as "facility," Ecology can define a given "site" as something less for cleanup (and finality) purposes. This would provide an incentive for parties to actually commit to cleanup and resolve their liabilities. I think Ecology and the AG's Office also have discretion under the settlement authority in MTCA to settle for a cleanup that is less than the whole "facility." MTCA provides:

> The attorney general may agree to a settlement with any potentially liable person only if the department finds . . . that ***the proposed settlement would lead to a more expeditious cleanup of hazardous substances*** in compliance with cleanup standards under RCW 70.105D.030(2)(e) and with any remedial orders issued by the department.

RCW 70.105D.040(4)(a). Notably the statute discusses entering settlements for the expeditious cleanup of "***hazardous substances***" -- and not "facilities."

This is an attempt to find a way for a PLP to get finality for a whole site without having to commit to chasing down every molecule of contamination.

C. Recontamination/Cash-Out Trust Fund:

For large, multi-party sites, another option is to have Ecology establish a recontamination or other trust fund that a party could pay into to get finality for a larger "site" where recontamination is an inevitability, or where the party just wanted to buy its way out of a larger site that has ubiquitous contamination. It could be used in conjunction with a hot spot

or cleanup unit approach to allow a party to clean up a hot spot and then essentially cash out for the remainder of the site. Ecology could also use that fund to accept cash out settlements for natural resource damage claims and use the money in the fund for restoration projects, in addition to additional cleanup.

D. Keep the SMS Decision-Making Framework

Right now the SMS allows for cleanup standards to be set within a range, from a low end of the SQS to a high end of the CSL. In deciding where in that range the cleanup level will be set, the SMS allows Ecology to consider cost and technical feasibility, among other issues. This, in turn allows for the possibility of setting a higher (but more feasibly-achieved) cleanup level that, once reached, would give the PLP finality for the Site.

Ecology wants the SMS to better protect human health and to be more consistent with MTCA on that. So, I propose allowing cleanup standards to be set within a range from the low end of 10^{-6} to a high end of "Regional Background" or a 10^{-4} cancer risk (whichever is higher). If Ecology kept the SMS decision-making framework for that, it would allow Ecology to take cost, technical feasibility and net environmental benefits into account in setting the cleanup standard. And, once a PLP reached that (presumably higher) cleanup standard, the PLP would have finality.

E. Include a "Federally-Permitted Release" Defense in Consent Decrees for Cleanup at Contaminated Sediment Sites

CERCLA contains a federally-permitted release defense that protects those who discharge in compliance with approved permits from liability associated with those discharges. MTCA contains no similar provision.

However, at contaminated sediment sites in large urban embayments, it would provide incentive for a PLP to clean up the sediments in front of their facility if they knew they would not be held liable for recontamination caused by their permitted discharges. This may require that a PLP monitor for more pollutants than it would have otherwise. However, this may be a preferable trade off for a PLP to avoid a re-opening of its consent decree or a contribution lawsuit related to its permitted discharges.

III. Conclusion

These are an attempt to find ways Ecology can, using existing authority in MTCA, provide incentives for cleanup, and are to spur discussion more than anything else. These clearly are for those PLPs who are linked to identifiable contamination and want to get some finality in return for stepping up and achieving some level of cleanup. What I am still wrestling with is what incentives might bring everyone else to the table – the less easily identifiable, smaller PLPs who currently have few incentives to step forward.